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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 170

SAMUEL MOSLEY,

Petitioner,

against

CIA. AR. ÁDRA, S.A.,

and

LIPSETT STEEL PRODUCTS, INC.,

Respondents.

ANSWER OF LIPSETT STEEL PRODUCTS, INC. TO THE PETITION OF SAMUEL MOSLEY FOR WRIT OF CERTIORARI

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Foreword

The petition herein in the last paragraph quotes in part what Judge Clark said in his dissent in the Court of Appeals herein (p. 19). The full quotation is as follows:

> "Regretfully I must conclude that this is yet another instance where my brothers determinedly deny the benefits of trial by jury to Jones Act plaintiffs."

(Petitioner's Appendix herein, p. 34). Of course, the petitioner did not sue under the Jones Act, he did not

claim to be a member of a crew of a vessel, as is required under the Jones Act, he did not sue his employer, which is a seaman's only remedy under the Jones Act and the jury's verdict was not based on negligence, which is the only possible basis of recovery under the Jones Act (46 U.S.C. 688)." Petitioner was a longshoreman and the defendant below, Cia. Mar Adra, did not employ him. He did not assert a claim under any statute. Any suspicion that this is a Jones Act case must be dispelled, irrespective of whether the right to a jury trial in a Jones Act case is the same as, or different from the right to a jury trial in other cases. We are mindful that this Court said in *Rogers* v. *Missouri P. R. Co.* (cited at page 11 by petitioner), 352 U. S. 500 at 509:

> "* * * the special features of this statutory negligence action * * * make it significantly different from the ordinary common law negligence action * * *."

The instant respondent does not base its argument herein on any such distinction however. Petitioner's contentions are too vulnerable for respondent to rest its opposition to certiorari herein on any such distinction regardless of its force.

Because we have here again a petitioner who seeks to have this Court re-evaluate testimony in a case, without raising any new or novel question of law, nor one which has not already been decided by this Court many times, and because petitioner's statement of facts is incomplete, a restatement of these facts is necessary.

Facts

Petitioner, Samuel Mosley, in 1933 or 1934, while working in the hold of a ship, was struck from above by a load of lumber which hit him on the head, neck and body, rendering him unconscious so that he was taken by ambulance

to a hospital to which he was confined for 19 days (R. 19a). He was unable to work for three months (R. 20a).

In the instant suit Mosley claims that he sustained injuries on October 15th, 1956, while working as a longshoreman all alone in the No. 5 'tween deck of the *S/S Turmoil*. He claims the alleged injury occurred at 9:30 or 10:00 A. M., that he remained in the 'tween deck of the ship until noon when he came up on deck for lunch. He stayed on the ship until 4:00 P. M., knock-off time (R. 18a). That night he reported to a Union Meeting as he did again during the following days, October 16th and October 17th (18a). Petitioner reported for work and worked October 18th, 1956 and almost every day until April 15th, 1957 (R. 18a). Petitioner did not seek or obtain medical or hospital treatment on the day of the alleged occurrence.

Initially and for a considerable period after the alleged occurrence petitioner limited his complaint to pain in the leg (R. 91a), but in the instant suit plaintiff complains of a ventral herniated disk in cervical vertebrae 5 and 6 (R. 113a), for the correction of which he submitted to operative intervention on April 15th, 1957, or six months after the alleged occurrence herein. During this six months he worked steadily as a longshoreman (R. 18a).

The incident out of which this suit arises occurred during loading of the *M/V Turmoil* with scrap iron. A chute extending from the weather deck into the hold was used to convey the scrap. Petitioner, in the 'tween deck alone, was watching the scrap come down the chute. When a heavy piece of scrap became wedged in the chute blocking it, petitioner attempted to remove it. In so doing he claims he was hurt. Petitioner alternately described the object which jammed as the rear end or transmission of an automobile:

"Q. But on this occasion something became stuck in the chute; that is what you're telling us? A.

That's right, a piece of rear end or some sort of a car transmission." (R. 85a)

Obviously, this was an extremely heavy piece of scrap.

In describing what happened petitioner testified (R. 9a):

"Q. Now, then, what is it that you did in order to try to dislodge this piece of metal that was stuck in the chute? A. Seeing this piece of metal stuck in the chute, I taken my hook, fastened it around the top of this metal, and I went to pull upon this hook in order to remove this piece of metal out of there, but in so doing, pulling as hard as I did, my feet begin to slip, and as I started to slip the hook slipped off and I fell."

That petitioner pulled with all his might is obvious.

Petitioner further testified (R. 13a):

"Q. Now, when you used the hook immediately before you were injured, and you were pulling, can you describe in words—you have told us before that you had to stand erect to do this; that is right, isn't it? (116) A. Yes, sir.

"Q. Now, are you righthanded or lefthanded? A. I am righthanded, sir.

Q. You are righthanded. Now, when you pulled, did you stand square to the chute, or were you turned one way or the other, or how did you stand? A. Oh, you are speaking of the piece of metal that was lodged into the chute?

Q. Yes, I am speaking of the piece that was lodged in the chute. A. I was turned to the side of the chute.

You were standing where? A. Standing at the side of the chute."

Pettioner further testified (R. 15a):

"Q. So you do not know whether your left foot was forward of your right or your right foot forward of

your left? A. Well, I am almost sure my feet were, from—the usual way I would stand, I would try and make it—the way I had to pull the steel out, I would more or less put my left foot forward—

Q. I see. A. —as near as I possibly could.

Q. Now, then, you stand erect, you say? A. Beg your pardon.

Q. You stood erect? You did not lean over? You stood straight up? A. Well, that I cannot say either, sir. That is impossible to say.

Q. I see. Now, then, when you pulled did you have your left hand forward or your right hand forward, or the two of them together? A. No. You have your right hand this way.

(122):

(122) Q. Well, you are indicating now left hand forward. A. Yes, sir.

Q. And behind it, the right hand. A. Yes, sir.

Q. Is that right? A. That's right.

Q. Now, then, did you pull with your hands or your body, or how did you perform the next move? A. It is all together, weight—in working in longshoreman's work or any type of work that you work on manually, you use your strength along with your weight.

Q. What? A. You use your strength along with your weight."

And, petitioner further testified (R. 17a):

"Q. You are going back with your shoulders, as you demonstrated? A. I believe I said a while ago that you use your strength along with your weight.

Q. But you leaned back, is that it, when you pulled? (124) A. You pulled back with it, yes, sir.

Q. I see. Now, then, your feet were in the same place as you are pulling you are not moving your feet, are you? A. I didn't move. My feet slipped from under me.

Q. Now, you didn't pull yourself. You kept your feet firm and pulled back; is that it? A. Yes, sir."

Petitioner thus was pitting his strength and weight against the weight and inertia of the automobile transmission or rear end in the chute caused by the latter's dead weight and its being wedged in the chute (Petitioner neither sought nor did he obtain any help). One or the other of the two forces had to give or yield. Petitioner's feet lost traction as he pulled with all his might and the heavy scrap refused to move.

The witness who first reached petitioner, testified (R. 132a-133a):

"Q. All right. Now, getting down to this date of October 15, 1956, on that day did it come to your attention that Mr. Mosley was injured, on the *S.S. Turmoil?* A. Yes, it did.

. . . . . .

Q. Now, where did you go? First of all, what hatch was this that was being loaded at the time you refer to, Mr. Brown? A. This is No. 5 hatch, after, after end of No. 5.

Q. Was this in the lower hold in the 'tween deck? A. It was in the deck, 'tween.

Q. Now, you and Mr. Prince went down there? A. Yes, we did.

Q. And as far as Mr. Mosley was concerned, what did you then see? A. Mr. Mosley was sort of lying in the wings of the ship, and we was asking him what was wrong with him. So he was telling us he was in such misery in his leg, he had hurt his leg. So I suggested after (268) looking at him, I suggested that he make a report of it. We didn't see any bruises, any such thing as that. So he asked us to just give him time, a little time. So we waited around, and so then Prince and I stood him up. So he asked us to assist

him around, walked him around, to work this misery out. So inasmuch as we did that, so he says he would be all right. So after that I had the personnel of the deck to lower the chute. So when they lowered the chute Mr. Prince and I pulled this piece of steel out, and we went back into operation, we went back, and we left Mr. Mosley standing forward of the wings, and from then on we just let him take it easy for the rest of the day."

(In removing the transmission from the chute this witness did not require, see or obtain any additional light):

"Q. When you first saw Mr. Mosley, was he standing up, seated, lying down? How was he? A. Well, there was some hatch covers in the wings, and so he had fallen or rested backwards on this. He wasn't sitting in an upright position. He was stretched out, rubbing his leg when we found him."

In the weeks following, petitioner made two or three visits to a doctor (R. 91a) and received "heat treatment or short-wave diathermy" on his right thigh (R. 91a). He made no complaint to his doctor (R. 19a) about his neck and did not receive any treatment on his neck for a considerable time.

Proceedings in the Trial Court and in the Court of Appeals

At the trial the defendant and third-party defendant rested without putting in any proof at the end of the plaintiff's case. It was their position at the trial and on the appeal in the Court of Appeals, that there was a total lack of proof of any negligence by the shipowner, or any unseaworthiness of the ship. The Trial Court dismissed the claim of negligence and no appeal was taken by the petitioner from that dismissal.

There was no proof that the *M/V Turmoil*, the ship involved, was not equipped with lights in the area where the petitioner was working when he claims to have been hurt, nor was there any proof that any of the ship lights were defective, or not in working order. Petitioner's case, as to insufficient lighting, rested solely on his own testimony that the 3-feet high pile of heavy metal, which he was loading and which was in the square of the hatch, diminished the sunlight coming down to the 'tween deck through the square of the hatch, which was 20 feet long and 15 feet wide. At most, what petitioner proved was a negligent failure to turn on lights and as to that there was no proof that the petitioner, or anyone else, asked for additional lighting in the hold. Petitioner testified:

> "Q. But if you got to this coaming you could see there, couldn't you? A. To the coaming?
>
> Q. Yes, A. Yes, when you get to that coaming you can see, because the light shines straight down by the coaming.
>
> Q. Shines right down by there on the coaming? A. Shines down, right down on the coaming, right straight down you can see, I mean, below." (Trial Minutes, pp. 244-245)

Petitioner stood "approximately four or five feet" from the chute which was in the square of the hatch (R. 14a).

In the Court of Appeals, Judge Friendly said:

> "My doubt is whether plaintiff's evidence as to the lighting sufficed to warrant submission to the jury at all."

Judge Marshall said:

> "We are less certain, however, as to whether a jury could be permitted to conclude on the evidence presented below that the absence of lighting was the proximate cause of plaintiff's injuries."

Judge Marshall further pointed out that petitioner admitted he knew he was standing on scrap and that he admittedly made no effort to clear away any of the scrap from under his feet, because that "would take about five minutes."

In the Court of Appeals this respondent expressly challenged the petitioner "to point to a single word of testimony" which would support a finding that the hook used by Mosley in any way was defective in material, design or condition. Petitioner failed to meet that challenge then, and now again in his petition, he fails to point to any testimony, for there is none, in support of the claim that the ship was unseaworthy because of the hook which he elected to use.

Of course, even if the hook had been defective, its mere presence on the vessel would not have rendered the vessel unseaworthy. It was only when petitioner used the hook and because of the way he used it, that any claim of unseaworthiness could arise. Thus, the vessel was not unseaworthy in any event, if at all, until the very instant that the petitioner put the hook on the rear end or transmission which was stuck in the chute. Up to that instant, at least, the shipowner had provided a seaworthy vessel. If the vessel was rendered instantaneously unseaworthy, the petitioner himself is responsible for that condition.

The petitioner was the only one working in the 'tween deck of No. 5 hold (R. 13a). If the ship negligently failed to turn on lights, the petitioner likewise is responsible, because he admitted in his testimony that he made no complaint of lack of light and there is no proof that he requested light from anyone.

Petitioner testified:

> "Q. Now, did you make any complaints to anybody about the working conditions down in No. 5 'tween deck? A. No, sir.

Q. You didn't make any complaint to any of the ship's officers, did you? A. No, sir.

Q. You made no complaints to your hatch boss, did you? A. No, sir." (Trial Minutes, p. 110)

On the basis of what this Court said in *Morales* v. *City of Galveston*, 370 U. S. 165, it was this respondent's position below that the complaint should have been dismissed at the end of the plaintiff's case.

> "What caused injury in the present case, however was not the ship, its appurtenances, or its crew . . . ." (p. 171)

Defendant and third-party defendant below preserved all rights by motions for *Judgment non obstante veredicto* (R. 52a). We also directed attention in the Court of Appeals to a number of errors in the Trial Court's charge. The Court charged that it was the shipowner's duty

> "to keep and maintain the ship and all decks, appliances, tools and equipment *in* the vessel in a seaworthy condition at all times."

(R. 36a) use of the word "in" the vessel, instead of "of" the vessel, improperly enlarged the shipowner's duty far beyond anything theretofore contemplated. The Court further improperly refused to charge that one who accepts employment on shipboard assumes the ordinary risks of that calling (R. 48a). The Court further improperly refused third-party defendant's request to charge, No. 1(b) (R. 28a) which was:

> "If you find plaintiff's injury was proximately caused solely by the fault or neglect of his employer, you must return a verdict in favor of the defendant and this is the end of the case." (R. 27a)

Thus, the verdict of the jury was unsupportable in law. It did not rest on proven facts and it resulted from a charge which was replete with error.

The Court of Appeals in remanding this case for a new trial thus could have based its action on a number of errors in the Trial Court's charge. Instead, it ruled only on one of these errors, leaving undecided this respondent's claims as to the other prejudicial errors in the charge.

The Fallacies in Petitioner's Contentions

The petitioner seems to contend that once a jury has rendered a verdict in a case, no power exists in any Court to set aside the verdict, even if there is no evidence to support it. The fallacy of such an argument at once is apparent. This Court has made that abundantly clear in *Heyman v. New York, New Haven & Hartford Railroad*, 364 U. S. 411, wherein this Court said:

> "We have examined the trial record and hold that the proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the respondent's injury.
>
> The judgment of the Court of Appeals is reversed and the cause remanded to the District Court with direction to enter judgment for petitioner notwithstanding the verdict."

In *Herdman v. Pennsylvania Rail Co.*, 252 U. S. 518, this Court affirmed judgment entered on a directed verdict in favor of the railroad-employer and said:

> "We agree with the lower courts that a jury question of negligence was not presented by the proofs."

In *Miller v. Farrell Lines*, 247 F. (2d) 503, this Court denied certiorari, 355 U. S. 912, even though a seaman's $55,000.00 jury verdict had been set aside by the Trial Court and the dismissal was affirmed on appeal. See also *Gallagher v. U. S. Lines*, 206 F. (2d) 177, cert. den. 346 U. S. 897.

The cases which petitioner cites at pages 11 to 18 of its petition are: (1) Jones Act or F.E.L.A. cases where different considerations are involved from those present herein; and, (2) cases where there was either conflicting testimony, or testimony corroborating the plaintiff. Some of the cases can be placed in both categories.

Rogers v. *Missouri-Pacific Rail Co.*, 352 U. S. 500, was reversed for an error of law. This Court interpreted the Missouri Court's reversal of the jury verdict in favor of the injured man to be based on the belief that under F.E.L.A. a jury must find that the employer's negligence was the sole cause of the injury instead of the correct rule that a plaintiff's verdict could be found if the employer's negligence:

> "played any part, even the slightest in producing the injury or death for which damages are sought." (506)

Based on such a rule this Court continued:

> "* * * The special features of this statutory negligence action * * * make it significantly different from the ordinary common law negligence action * * *." (509)

In *Harrison* v. *Missouri-Pacific Railroad Co.*, 83 S. Ct. 690, February 25th, 1963, there was an abundance of testimony of the assailant's propensities besides that concerning the assault. The assailant had been the subject of a warning "that he is a bad actor." It was said, "look out for him". He had been derelict in his duties on a number of occasions.

In *Basham* v. *Pennsylvania Railroad Co.*, 83 S. Ct. , April 15th, 1963, the plaintiff's testimony that the platform on which he was standing had moved, was corroborated by a witness who said he saw the platform move, as well as by other testimony that the platform had

moved on prior occasions. The railroad contended the platform could not move. Obviously, there was a jury question presented.

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, this Court said at page 55:

> "The opinion of the Utah Supreme Court strongly indicated as the dissenting Judge pointed out, that its finding of an absence of negligence of the railroad rested on that court's independent resolution of conflicting testimony."

Obviously, under F.E.L.A. such action was improper.

In *Gallick* v. *Baltimore & Ohio Railroad Co.*, decided by this Court February 18th, 1963, the opinion of this Court refers to 22 or more answers to special questions by the jury after a lengthy trial and pursuant to the Ohio Special Verdict Statute under which no general verdict is rendered by the jury. The opinion of this Court demonstrates that there was an abundance of testimony to support the answers to questions made by the jury and obviously, therefore, the setting aside of the judgment was error.

Petitioner's quotation from *Tennant* v. *Peoria P.U.R. Co.*, 321 U. S. 29, at page 15 of its petition, demonstrates that the lower Court had reversed judgment merely by weighing conflicting evidence, which clearly was improper.

None of the foregoing situations is that which is here involved. In the instant case the petitioner would ask that the hook, which he used, be held to be defective solely because it came off the heavy rear end or transmission which he was trying to move when his feet slid, as he pulled with all his might and main, using all of his strength and weight.

Petitioner talks about circumstantial evidence, but does not point to a single circumstance which would support

an inference that the hook was defective, except possibly the fact that the hook became disengaged under the circumstances under which it was being used.

Petitioner labors under the mistaken notion that the words "Jones Act" and "tools" work a special magic and petitioner thereupon cites a number of cases involving the Jones Act and tools.

Petitioner loses sight of the fact that in a crew member's suit for injuries caused by defective tools, totally different considerations come into play from those which are involved in a suit by a longshoreman who claims his tools were defective. A crew member owes to the shipowner, his employer, the duty to do work he is ordered to do. The shipowner-employer has a correlative duty to furnish the crew member with proper tools for him to do his work. In the case of a longshoreman, however, he owes no duty to the shipowner and the shipowner does not owe any duty to provide tools to the longshoreman.

Thus, when petitioner cites at page 15, the cases of *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 and *Jacob* v. *The City of New York*, 315 U. S. 752, and on page 16, *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, he cites cases which deal with a problem entirely different from that involved herein. In each of those cases, however, there was corroborating evidence to support the claim that the tool furnished to the crewman by his employer was defective. Those cases did not involve the claim which is made here, that from the happening of the accident alone, a jury was entitled to infer that the tool used by the petitioner was worn, defective or of improper design. This Court has made it abundantly clear that liability cannot rest solely on the happening of an accident. *Sieracki* v. *Ewing*, 228 U. S. 223.

The cases of *Tiller* v. *Atlantic Coast Line*, 323 U. S. 574 and *Atlantic Gulf Stevedores, Inc.* v. *Ellerman*, 369 U. S.

355, cited at page 17, have no bearing on the issues involved herein.

The petitioner's desperation is clearly demonstrated when he picks a sentence out of this Court's decision in *Morales* v. *City of Galveston*, 370 U. S. 165, and quotes it at page 17 of his petition. Taken out of context this quotation gives a distorted impression of what this Court held in that case.

In petitioner's quotation from this case he merely quotes:

> "A vessel's unseaworthiness might arise from any number of individualized circumstances."

The next sentence in this Court's opinion, however, reads:

> "Her gear might be defective, her appurtenances in disrepair, her crew unfit."

Petitioner really is advancing the fallacious argument that unseaworthiness is a broad type of negligence wherein proof of a specific defect is not necessary, and that a jury is free to find unseaworthiness as a generality from a conglomeration of facts and without any limitation by legal definition of the term unseaworthiness. We do not make this charge without support for it. In the Court of Appeals the petitioner said in his brief, at page 18:

> "Not that the vessel would necessarily be unseaworthy as a matter of law, but that the vessel might be thus held under all of the facts, as a matter of fact."

Petitioner would have a jury employ the negligence doctrine of unsafe place to work in a seaworthiness case, irrespective of whether there was any proof of notice, knowledge, custody or control and in contravention of the distinction made by this Court between the two doctrines in *West* v. *United States*, 361 U. S. 118 and other cases.

Judge Marshall in his opinion in the Court of Appeals quotes from the Trial Court's charge the reference made by the Trial Court to the hook, and Judge Marshall states that there is no other reference to the hook in the charge. It would seem that Judge Marshall has overlooked that part of the charge appearing in the record at R. 33a which reads:

> "Plaintiff asserts that his injuries resulted from the defendant Adra's failure to fulfill its obligation to provide a seaworthy vessel, including a place that is reasonably fit for the work to be performed . . ."

and, again, at R. 36a:

> "Under the maritime law Adra, as shipowner, owed to Mosley the absolute duty to keep and maintain the ship and all decks, appliances, tools and equipment in the vessel in a seaworthy condition at all times."

Thus, the jury was told that the shipowner had the duty to see to it that *any tool in* the ship was in a seaworthy condition at all times. This obviously included the hook. As Judge Marshall points out, the submission of the question of the unseaworthiness of the hook to the jury clearly was improper in view of the total lack of evidence, both as to whose hook it was and as to any defect in design, material or condition of the hook.

CONCLUSION

The petition of Samuel Mosley, plaintiff below, for certiorari, in all respects should be denied.

Dated: New York, New York, June 27th, 1963.

Respectfully submitted,

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